CANADA'S CONSTITUTIONAL DEMOCRACY: THE 150TH ANNIVERSARY CELEBRATION

General Editor

Errol P. Mendes

4. Post-World War I / The Quiet Revolution (1920-1970)

Through the Lenses of Legal Interpretation and International Law

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I. INTRODUCTION

Capturing half a century of legal history on the twin occasions of Canada's 150th anniversary and the 35 years of the *Canadian Charter of Rights and Freedoms*[1] is next to impossible within a dozen or so pages of scholarly work. But I shall do it anyway by focusing on two themes, in fact using a pair of lenses that, as it were, will allow us to identify long-lasting developments for the country's constitutional identity, including for the rights of citizens and, more generally, the rule of law.

The first theme is *legal interpretation*. What appears to be a mere matter of methodology in the discipline has ramifications in all areas of substantive law, through the impact of the Constitution, and by means of a generous approach to the whole corpus of law in this country. A significant case in the 1930s changed the paradigm according to which courts give meaning to the written law found in constitutional documents, and this change eventually extended to all legislative texts. The decision by the Judicial Committee of the Privy Council in *Edwards v. Canada (Attorney General)*,[2] with what later became known as the metaphor of the "living tree", marked the end of an era of strict legal

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["Charter"].

2 The references are as follows: at the Supreme Court of Canada, *Reference re British North America Act, 1867 (UK) Section 24*, [1928] S.C.J. No. 19, [1928] S.C.R. 276 (S.C.C.), and at the Judicial Committee of the Privy Council, *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124 (J.C.P.C.).

construction and the beginning of a new model to ascertain the intention of the constituting authority[3] in the *Constitution Act, 1867*,[4] and also later in the *Constitution Act, 1982* and the Charter.

The second theme is *interlegality*, or the rules concerning the interaction between international law and domestic law, including the conclusion of treaties and the use by courts of non-national normativity. Again, it was in the 1930s when the courts of highest instance for Canada laid down the foundations for understanding the dynamic at play in this regard in the so-called *Labour Conventions case*.[5] Indeed, given the principle of the separation of powers, as well as the federal structure of our country, the Privy Council had to find an equilibrium not only among the branches of governments, but also between the two levels (or orders) of constitutional authorities. In the end, this case recognized the plenitude of power of the federal government for the conclusion of international treaties, while holding that dualism meant that the (federal) Crown could make treaties, but that Parliament and the provincial legislatures needed to give legal effect to such conventions by means of statutes. The domestic implementation of treaty obligations had to be in line, rigorously, with the division of legislative powers under the Constitution.

This articulation of interlegality has remained the applicable scheme to this day, although one feature has been challenged at the political level. Indeed, during the Quiet Revolution in the 1960s, the province of Quebec started to claim its own *jus tractatus*. Thus the second section of this chapter ends with a look at the "Gérin-Lajoie" statement.

Finally, the conclusion will examine the significance of these historical developments for contemporary public law in Canada.

II. Legal Interpretation and the Edwards Case

Although found in the 1930 Appeal Cases Report, it was actually on October 19, 1929 that the avant-garde Lord Sankey, the Lord Chancellor appointed by Labour Prime Minister Ramsay MacDonald, ended the

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3 This neutral expression is used instead of the "founding fathers", which unfortunately cannot but remind us of the male-only participation and perspective at the two constitutional moments, in 1867 and, to a lesser extent, in 1982.

4 30 & 31 Vict., c. 3.

5 The references are as follows: at the Supreme Court of Canada, *Reference re The Weekly Rest in Industrial Undertakings Act (Canada)*, [1936] S.C.J. No. 31, [1936] S.C.R. 461 (S.C.C.); and at the Judicial Committee of the Privy Council, *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] J.C.J. No. 5, [1937] A.C. 326 (J.C.P.C.).

ludicrous disqualification (that is clearly misogynistic by today's standards) and held that women were persons eligible to be appointed to the Senate of Canada. In his words, apparently audacious for the time: "the exclusion of women from all public offices is a relic of days more barbarous than ours".[6] Hence the surname often given to this Privy Council decision is the *Persons case*,[7] although it is generally referred to as the *Edwards case*.

The story[8] behind this reference case is one of tireless courage and of incredible determination by a woman named Emily Murphy.[9] She was a respected author and social activist who made history — if not, in the end, as the pioneer female appointed to the Senate[10] — for being the first woman magistrate in the British Empire in the so-called "Women's Court" created in 1916 in Edmonton, Alberta. After pursuing an appointment to the Senate and lobbying on her own for nearly a decade, she took the matter to the courts as the leader of a small group of women in Alberta who became known as the "Famous Five". One of the five was Henrietta Edwards, who lent her name to the case. Although, perhaps anachronistically, today they are labelled "maternal feminists" whose progressiveness was perhaps overshadowed by values bordering on white supremacy,[11] what they achieved ultimately remains paradigmatic, not only for the substantive cause of equality and non-discrimination, but also for the opportunity it gave to change the dominant epistemology in constitutional interpretation in Canada.

Similar to advisory opinions at the International Court of Justice,[12] it is common practice in this country to submit legal questions, including

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6 *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124 at 128 (J.C.P.C.).

7 See Robert J. Sharpe, "The *Persons Case* and the Living Tree Theory of Constitutional Interpretation" (2013) 64 U.N.B.L.J. 1.

8 For a much more detailed story, see Robert Sharpe & Patricia McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (Toronto: Osgoode Society and University of Toronto Press, 2007).

9 See Byrne Hope Sanders, *Emily Murphy – Crusader* (Toronto: Macmillan, 1945).

10 Shortly after the case, in February 1930, Carine Wilson was appointed to the Senate by Prime Minister Mackenzie King.

11 See Mariana Valverde, "When the Mother of the Race is Free: Race, Reproduction, and Sexuality in First Wave Feminism", in Franca Iacovetta & Mariana Vaderde, eds., *Gender Conflicts: New Essays in Women's History* (Toronto: University of Toronto Press, 1992) at 3.

12 Article 65 of the *Statute of the International Court of Justice*, annex to the *Charter of the United Nations*, June 26, 1945, Can T.S. 1945, No. 7.

matters pertaining to the Constitution, by means of so-called "references", be it from provincial governments to their appellate courts or from the federal government to the Supreme Court of Canada.[13] Significantly for Emily Murphy and her group, this procedure meant that they did not have to show legal standing in the case, nor a demonstrable legal claim to make, nor did they have to fund the cost of the legal challenge. However, they had to successfully petition the federal government to endorse the cause and have the Governor in Council direct a reference to the Supreme Court of Canada. Fortunately, Prime Minister Mackenzie King was not at all reluctant to use the reference power. Indeed, this was known then (as now) as an excellent strategy for getting a hot potato out of the government's hands and into the hands of the judiciary.

On April 24, 1928, the Supreme Court of Canada handed down its decision, with the lead opinion written by Chief Justice Anglin.[14] Although it has been suggested that his Court was particularly (or perhaps overly) formalistic,[15] in reality, the Court adopted an interpretative approach in the *Edwards case* that was appropriate and prevalent for the time. Courts interpreted constitutional enactments — such as the *British North America Act, 1867*,[16] which was, technically, an Imperial statute adopted in Westminster — like any other piece of legislation passed by Parliament. Thus, the Court gave a literal meaning to the expression "qualified persons", insisting on the letter of the law as provided by the constitutional provision (section 24) and, crucially, favouring a static (or originalist) interpretation: the law was to be understood in the same matter as when it was passed in 1867, frozen in time. In the words of Anglin C.J.C.:

> [The provisions of the Constitution] bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.[17]

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[13] In today's version, this authority is found in the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53.

[14] *Reference re Section 24 of the British North America Act*, [1928] S.C.J. No. 19, [1928] S.C.R. 276 (S.C.C.), revd [1929] J.C.J. No. 2, [1930] A.C. 124 (J.C.P.C.).

[15] See Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at 56.

[16] Later renamed the *Constitution Act, 1867*.

[17] *Reference re Section 24 of the British North America Act, 1867*, [1928] S.C.J. No. 19, [1928] S.C.R. 276 at 282 (S.C.C.), revd [1929] J.C.J. No. 2, [1930] A.C. 124 (U.K.P.C.).

For the era, this was a textbook approach to the interpretation of the law — constitutions and statutes alike — one that ascertains legislative intent at the time of enactment.[18]

Then came the ground-breaking decision in *Edwards* by the Judicial Committee of the Privy Council, which was the court of highest instance for Canada until 1949. This judicial body has marked our constitutional history for, among other things, favouring a decentralization in the country's federal arrangement and enhancing provincial autonomy.[19] For the methodology of legal interpretation, its 1929 judgment amounted to a mini-revolution, for it signalled a radical epistemological change in the way that the meaning of Constitution Acts is ascertained. In both areas (federalism and construction),[20] the underlying narrative was the rejection of the framers' intention theory — referred to as "originalism" in the United States of America[21] — as the Privy Council was willing to distance itself from what was contemplated by the constituting authority in 1867. For the interpretation of constitutional documents, it meant brushing aside the textual rule of static interpretation and replacing it with a dynamic way to identify normative content, one that gives weight to the context of application and the contemporary understanding of the Act.

This approach to constitutional interpretation in Canada is widely known as the "living tree" principle, or metaphor, a celebrated phrase coined by Lord Sankey in the *Edwards case*:

> The *British North America Act* [*i.e.*, the *Constitution Act, 1867*] planted in Canada a *living tree* capable of growth and expansion within its natural limits. ...
>
> Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a *large and liberal interpretation* so that the Dominion to a great extent, but within certain

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[18] See generally, Pierre-André Côté (coll. Stéphane Beaulac & Mathieu Devinat), *Interprétation des lois*, 4th ed. (Montreal: Éditions Thémis, 2009), part 2, chapter 1, "La méthode grammaticale ou les arguments de texte".

[19] See generally Richard Risk, *A History of Canadian Legal Thought – Collected Essays* (Toronto: University of Toronto Press, 2006).

[20] See generally Frederick Vaughan, *Viscount Haldane – Wicked Stepfather of the Canadian Constitution* (Toronto: Osgoode Society and University of Toronto Press, 2010).

[21] The main proponent of this doctrine was the late Justice Antonin Scalia; see *inter alia*: "Originalism: The Lesser Evil" (1989) 57 U. Cincinnati L. Rev. 849. More generally, see the symposium papers "Originalism, Democracy and the Constitution" (1996) 19 Harvard J. L. & Pub. Pol'y 311.

> fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits are mistresses in theirs.[22]

Put another way, the "living tree metaphor described the constitution in the organic terms of growth and evolution".[23] The Canadian approach is indeed diametrically opposed to originalism,[24] which is favoured in some American circles.[25] Consider, for example, the position of the late Justice Antonin Scalia: "the [American] Constitution that I interpret and apply is not living but dead — or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted."[26] In a sense, the image of the "living tree" is surely one of the main distinguishing features of Canada's Constitution.[27]

In the *Edwards case*, the living tree approach was applied to reverse the Supreme Court of Canada's decision and allow both genders to be deemed "qualified persons" for appointments to the Senate of Canada, pursuant to section 24 of the (now) *Constitution Act, 1867*. Lord Sankey reviewed the authorities, and referred to the centuries of discrimination that excluded women from public office. Although probably understood accordingly by the constituting authority then, he held that the "word [persons] is ambiguous and in its original meaning would undoubtedly embrace members of either sex".[28] By regarding the Constitution as a timeless law that can adapt over time to address the evolving Canadian society, Lord Sankey was able to turn the formalistic argument on its head and suggest the following: "The word 'person' as above mentioned may include members of both sexes, and to those who ask why the word should include females, the

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[22] *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124, at 136 (J.C.P.C.) [emphasis added].

[23] Robert J. Sharpe, "The *Persons Case* and the Living Tree Theory of Constitutional Interpretation" (2013) 64 U.N.B.L.J. 1 at 15.

[24] *Contra*, see Grant Huscroft & Bradley W. Miller, eds., *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge: Cambridge University Press, 2011); and, more recently, from other legal revisionists, Benjamin J. Oliphant & Léonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'?" (2016) 42 Queen's L.J. 107.

[25] Even in the United States, many forcefully reject originalism: see, for a recent example, Eric J. Segall, "The Constitution Means What the Supreme Court Says it Means" (2016) 129 Harv. L. Rev. Forum 176.

[26] Antonin Scalia, "God's Justice and Ours" (2002) 123 First Things 17 at 17-18.

[27] See Peter W. Hogg, "Canada: From Privy Council to Supreme Court", in Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 55; and Luc B. Tremblay, "Two Models of Constitutionalism and the Legitimacy of Law: Dicey or Marshall?" (2006) 6 Oxford U. Commonwealth L.J. 77.

[28] *Edwards v. Canada (Attorney General)*, [1929] J.C.J. No. 2, [1930] A.C. 124 at 134 (J.C.P.C.).

obvious answer is why should it not."[29] In terms of legal interpretation, this statement is both simplistic and bulletproof, but it was no doubt quite powerful to prepare the grounds for the conclusion reached.

Back to the impact of the *Edwards case* living-tree metaphor. Although it was not received enthusiastically by all members of the Canadian legal community at the time,[30] the decision was followed in constitutional interpretation, not only with regard to the *Constitution Act, 1867* (division of powers; government institutions), but also in the construction of the *Constitution Act, 1982* and its *Canadian Charter of Rights and Freedoms*.[31] Indeed, the Supreme Court of Canada made it clear soon after the repatriation of 1982 that the "living tree" was going to live on, so to speak, and be expanded in its scope. The Court relied on the doctrine in the *Skapinker case*[32] and the *Hunter case*,[33] both in 1984, to justify an interpretative approach deemed materially different from regular construction; it became known as the purposive interpretation of the Canadian Charter.[34]

Although it was never set out in explicit terms, there are reasons to believe that Lord Sankey's plea for large and liberal interpretation which favours a dynamic and non-originalist meaning of normativity, has influenced not only constitutional interpretation, but the general methodology of statutory interpretation as well. I will return to this in the conclusion.

III. INTERLEGALITY AND THE LABOUR CONVENTIONS CASE[35]

Possibly with the *Treaty of Versailles* in 1919, and quite surely with the *Halibut Treaty* in 1923, the emancipation of Canada *vis-à-vis* Great

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29 *Ibid.*, at 138.

30 See, for instance: George Henderson, "Eligibility of Women for the Senate" (1929) 7 Can. Bar Rev. 617.

31 See Randal N.M. Graham, "Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and 'Fundamental Laws'" (2006) 34 S.C.L.R. (2d) 169.

32 *Law Society of Upper Canada v. Skapinker*, [1984] S.C.J. No. 18, [1984] 1 S.C.R. 357 (S.C.C.).

33 *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

34 Having said that, I have argued in previous writings that this claim is, by and large, grossly exaggerated, as the methodology of interpretation appears, especially nowadays, to have converged in regard to both constitutional documents and regular statutes. See Stéphane Beaulac, "L'interprétation de la Charte: reconsidération de l'approche téléologique et réévaluation du rôle du droit international", in Gérald.-A. Beaudoin & Errol P. Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Toronto: Butterworths, 2005) at 25.

35 This section borrows from Stéphane Beaulac, "The Myth of *Jus Tractatus* in *La Belle Province*: Quebec's Gérin-Lajoie Statement" (2012) 35 Dal. L.J. 237.

Britain was fully completed in regard to the capacity to make and unmake international treaties. This authority over treaties, also known as *jus tractatus*, was assumed by the Crown in right of Canada, that is to say, by the federal government, and this constant continuing constitutional practice, *de facto*, has been confirmed by binding constitutional norms *de jure*, namely, by the *Letters Patent* of 1947.[36]

Between these two historical events, in 1936-1937, came the landmark case known as the *Labour Conventions case*,[37] which raised many issues of authority in relation to international treaties. This was another reference that started at the Supreme Court of Canada and involved three conventions concluded by the Canadian federal government under the auspices of the International Labour Organization, and in respect of which the federal Parliament had enacted three pieces of legislation to implement them domestically. In the end, the Privy Council held that these pieces of legislation were *ultra vires* because, essentially, the incorporation of international treaties (required under the so-called dualist theory) must follow the division of legislative authorities under sections 91 and 92 of the *Constitution Act, 1867*.

The subject-matter of the conventions concerned labour law and therefore fell under provincial authority. As a result, the federal Parliament could not implement them by means of legislation. This feature is accurately described as the *ratio decidendi* of the *Labour Conventions case*, which was severely criticized by many legal writers (both anglophones and francophones),[38] and was even put in doubt by some Supreme Court of Canada justices in a couple of *obiter dicta* in the 1950s and 1970s.[39]

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[36] *Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada* (October 1, 1947), R.S.C. 1985, App. II, No. 31.

[37] At the Supreme Court of Canada, *Reference re The Weekly Rest in Industrial Undertaking Act*, [1936] S.C.J. No. 31, [1936] S.C.R. 461 (S.C.C.); and at the Judicial Committee of the Privy Council, *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] J.C.J. No. 5, [1937] A.C. 326 (J.C.P.C.).

[38] See Norman A.M. MacKenzie, "Canada and the Treaty-Making Power" (1937) 15 Can. Bar Rev. 436; Frank R. Scott, "The Consequence of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485; Alexander B. Elkin, "De la compétence du Canada pour conclure les traités internationaux – Étude sur le statut juridique des Dominions britanniques" (1938) 45 Revue générale de droit international public 658; George J. Szablowski, "Creation and Implementation of Treaties in Canada" (1956) 34 Can. Bar Rev. 28; Edward McWhinney, "Federal Constitutional Law and the Treaty-Making Power" (1957) 35 Can. Bar Rev. 842; Gérard V. La Forest, "The Labour Conventions Case Revisited" (1974) 12 Can. YB Int'l L. 137; and S. Beaulac, "The Canadian Federal Constitutional Framework and the Implementation of the Kyoto Protocol" (2005) 5 Revue juridique polynésienne (hors série) 125.

[39] See Kerwin J. in *Francis v. Canada*, [1956] S.C.J. No. 38, [1956] S.C.R. 618 at 621 (S.C.C.); and Laskin C.J.C. in *MacDonald v. Vapor Canada Ltd.*, [1976] S.C.J. No. 60, [1977] 2 S.C.R. 134 at 169-71 (S.C.C.).

The other highly important holding in the *Labour Conventions case* concerns *jus tractatus*, the power in Canada to conclude international treaties with other states. It is an error to suggest that the Privy Council was neutral with respect to *jus tractatus* in 1937.[40] The claim comes from the following passage of Lord Atkin's speech:

> [A]s their Lordships have come to the conclusion that the reference can be decided upon the question of legislative competence alone, in accordance with their usual practice in constitutional matters they refrain from expressing any opinion upon the question [of treaty-making power].[41]

A proper reading of Lord Atkin's opinion, however, requires that other passages be taken into account which clearly show where the Privy Council stands on Canada's *jus tractatus*. When dwelling upon treaty implementation and the necessary collaboration between the executive and legislative branch of government, a process all the more complex given the federal nature of the country, Lord Atkin takes it for granted that the federal government enjoys full treaty-making power, independently of the subject-matter of the convention. Here is the excerpt:

> The obligations imposed by treaty may have to be performed, if at all, by several Legislatures; and *the [federal] executive have the task of obtaining the legislative assent not of the one Parliament to whom they may be responsible*, but possibly of several Parliaments to whom they stand in no direct relation.[42]

Albeit an *obiter dictum*, this is a compelling (implicit) indication that Lord Atkin opined that the federal government is fully empowered to make and unmake any international treaty on behalf of Canada.

There is another more relevant passage in the judgment, which not only endorsed the Supreme Court of Canada ruling in regard to *jus tractatus* (examined in a moment), but also expressed the view that the federal government has full treaty-making power:

> It is true, as pointed out in the judgment of the Chief Justice, that *as the [federal] executive is now clothed with the powers of making treaties* so the Parliament of Canada, to which the executive is responsible, has

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[40] Indeed, there is no jurisprudential vacuum in our public law in regard to treaty-making. This is a mistake some Quebec legal writers make; *e.g.*, Hugo Cyr in his Ph.D. thesis, published as *Canadian Federalism and Treaty Powers – Organic Constitutionalism at Work* (Brussels: P.I.E. Peter Lang (Diversitas), 2009).

[41] *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] J.C.J. No. 5, [1937] A.C. 326 at 348-49 (J.C.P.C.).

[42] *Ibid.*, at 348 [emphasis added].

> imposed upon it responsibilities in connection with such treaties, for if it were to disapprove of them they would either not be made or the Ministers would meet their constitutional fate. But this is true of all executive functions in their relation to Parliament. There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged *to keep pace with enlarged functions of the Dominion executive*.[43]

Clearly then, the underlying premise for the ruling (*cf.* federalism and treaty implementation) is that Ottawa has the plenary authority to make and unmake international treaties, whatever the subject-matter.

Moreover, unlike the Privy Council, the Supreme Court of Canada opined — not implicitly, but explicitly — that the case must be decided in favour of the federal government and, to be precise, should be decided first and foremost on the basis of Ottawa's plenary treaty-making power. To be sure, the Privy Council claimed to provide no formal ruling on the treaty-making power (though indirectly they did, as we just saw); the case was decided on the basis of federalism and treaty implementation, but Lord Atkin did not overrule the Supreme Court of Canada on *jus tractatus*. This is most significant.

Thus, as a matter of jurisprudence, consistent with the *Labour Conventions case*, it is the law in this country that the plenary power to make and unmake treaties belongs to the federal government. Although it is trite, an author[44] reminds us why this is the situation in positive law: since these two decisions in the 1930s, no Canadian court (nor any Quebec court) has revisited or reconsidered, let alone put into doubt, the validity of this unwritten constitutional legal rule. In fact, only once did our highest Court speak explicitly on this issue again. In *Thomson v. Thomson*, L'Heureux-Dubé J. (with McLachlin J., as she then was) wrote a concurring set of reasons stating that the federal government had "exclusive" treaty-making jurisdiction.[45]

To recap, for nearly a century, the law on *jus tractatus* in this country has been settled: the Crown in right of Canada, the federal government, enjoys full power when it comes to making and unmaking treaties. To be clear, this entails that Ottawa can strike such agreements with other states, whether the subject-matter is federal or provincial (section 91 or 92,

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43 *Ibid.*, at 352 [emphasis added].

44 See John H. Currie, *Public International Law*, 2d ed. (Toronto: Irwin Law, 2008) at 240.

45 *Thomson v. Thomson*, [1994] S.C.J. No. 6, [1994] 3 S.C.R. 551 at paras. 112-113 (S.C.C.).

Constitution Act, 1867). This has been the uninterrupted practice, *de facto*, since 1919 with the end of the First World War — or since the 1923 *Halibut Treaty* — which was confirmed, *de jure*, by the Privy Council (implicitly) in the *Labour Conventions case*, and by the Supreme Court of Canada (explicitly) in the same case. This *de jure* situation was validated by the 1947 *Letters Patent* regarding the office of Governor General, making official the transfers of all powers, including treaty-making powers, from Westminster to Ottawa.

This understanding of the law since the 1930s was also accepted by all legal and political actors, unanimously ... up until the mid-1960s.[46] Although not always expressed with the same zeal, the political position of the province of Quebec has been to claim its own treaty-making power. Many stakeholders (politicians and academics) have taken the habit of associating their position with a political statement made by Education Minister Paul Gérin-Lajoie. This is referred to by secessionist-leaning publicists as a "doctrine", thus insinuating that it actually carries some normative value, suggesting that it is a position on par, as it were, with the legal situation prevailing in our constitutional law.

What is the Gérin-Lajoie statement exactly? Challenging constitutional legal orthodoxy, it is a political position to the effect that Canadian provinces (particularly Quebec) ought to have the power to conclude international treaties on subject-matters falling under their legislative authorities, pursuant to section 92 of the *Constitution Act, 1867*. As one is bound to hear in Quebec City: "Ce qui est de compétence québécoise chez nous est de compétence québécoise partout." Although catchy, this is another mere political slogan, a unilateral declaration in fact; to be clear, statements such as this have no influence whatsoever on positive law in this country, including our constitutional law. Nor does the legislation enacted under then Premier Lucien Bouchard and his secessionist *Parti Québécois* government, namely, the *Loi sur l'exercice des droits fondamentaux et des prérogatives du people québécois et de l'État du Québec*.[47] Leaving aside the general *ultra vires* nature of this statute,[48] section 7(1) attempts to give legal effect to

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[46] The rhetoric out of Quebec City prompted Ottawa to write down in a document the rules according to which international relations have been conducted in this country, which included the normative foundation for the federal government plenary *jus tractatus*. See Department of External Affairs, *Federalism and International Relations* (Ottawa: Queen's Printer, 1968).

[47] R.S.Q. c. E-20.2. In English, *An Act respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*.

[48] See Frédéric Bérard & Stéphane Beaulac, *The Law of Independence – Quebec, Montenegro, Kosovo, Scotland, Catalonia* (Toronto: LexisNexis Canada, 2017).

the Gérin-Lajoie statement thus: "The Quebec State is free to consent to be bound by any treaty, convention or international agreement in matters under its constitutional jurisdiction."

Of course, any constitutional lawyer would tell you that the Quebec legislature cannot unilaterally change rules on *jus tractatus*. I have shown in detail elsewhere[49] that there is no legal basis for the Gérin-Lajoie claim in Canada's constitutional law. Here, let it suffice to say that the arguments put forward by a handful of Quebec scholars are a blatant stretch of the rules on royal prerogative and the relevant case law, namely, *Liquidators of Maritime Bank*[50] and *Bonanza Creek*.[51] Interestingly, the recent case in the United Kingdom challenging Brexit concerns the prerogative powers of the Crown and their interaction with legislation. The reasons given by both the High Court in London, in its November 2016 decision,[52] and the United Kingdom Supreme Court, in its January 2017 decision,[53] seem to confirm the traditional stance in regard to the extent of royal prerogative powers. Although these are foreign judgments, they may be used in Canada as one more authority in support of the plenary power of the federal government to make and unmake treaties, whatever the subject-matter.

IV. CONCLUSION

To conclude, first on *legal interpretation*, the "living tree" metaphor in *Edwards* has no doubt shaped a very distinctive Canadian approach to constitutional documents, such as the *Constitution Act, 1867*, and later the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedoms*. As it were, the methodological message it sent — not to construe legislation strictly and restrictively, with a meaning frozen in time, but rather to favour a large and liberal interpretation, in light of the underlying purpose and according to the contemporary understanding

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[49] See Stéphane Beaulac, "The Myth of *Jus Tractatus* in *La Belle Province*: Quebec's Gérin-Lajoie Statement" (2012) 35 Dal. L.J. 237.

[50] *Maritime Bank of Canada v. New Brunswick (Receiver General)*, [1892] J.C.J. No. 1, [1892] A.C. 437 (J.C.P.C.).

[51] *Bonanza Creek Gold Mining Co. v. Canada*, [1916] J.C.J. No. 3, [1916] 1 A.C. 566 (J.C.P.C.).

[52] See *R. (Miller) v. Secretary of State for Exiting the European Union*, [2016] EWHC 2768 at paras. 24-33 (Q.B.D.).

[53] See *R. (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 at paras. 47-59 (S.C.).

of the law — has brought a paradigmatic change to the epistemology of statutory interpretation as a whole.[54] Indeed, along with the so-called "modern principle" (articulated by Elmer Driedger[55]), endorsed by the Supreme Court of Canada since the mid-1980s,[56] the general method adopted when ascertaining the intention of Parliament has abandoned the plain meaning rule of literal interpretation, and also the insistence on the meaning at the time of enactment.[57] For some time now in Canada, to determine the normative content of the law, both in constitutional acts and in ordinary statutes, courts have favoured a generous and purposive interpretation, one that is dynamic and contemporary to the situation at issue, whenever it is appropriate to do so.[58]

With regard to *interlegality*, the heritage of the *Labour Conventions case* remains the law, unaffected by the Gérin-Lajoie statement and the political claims for a provincial *jus tractatus*, which began during the Quiet Revolution.[59] To say a few words about this 1960s period in Quebec (although it goes beyond the two themes for this chapter), it is surely another illustration of the province's tendency for hyperbolic narratives, indeed similar to the suggestion that the Gérin-Lajoie political statement is a "doctrine". As far as the legal and constitutional reality is concerned, at least — this is not to deny, of course, the profound changes in Quebec society then, including within its political class and with regard to the Catholic Church — nothing very "revolutionary" took place in the 1960s.

Two examples: First, the famous case of *Roncarelli v. Duplessis*,[60] associated with the triumph of the rule of law against the arbitrary power

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[54] See Stéphane Beaulac, "Constitutional Interpretation: On Issues of Ontology and of Interlegality" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 867.

[55] Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87.

[56] See Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 Revue juridique Thémis 131.

[57] See, generally, Stéphane Beaulac & Frédéric Bérard, *Précis d'interprétation legislative*, 2d ed. (Montreal: LexisNexis Canada, 2014).

[58] See Stéphane Beaulac, "'Texture ouverte', droit international et interprétation de la Charte canadienne", in Errol Mendes & Stéphane Beaulac, eds., *Canadian Charter of Rights and Freedoms*, 5th ed. (Toronto: LexisNexis Canada, 2013) at 191.

[59] See, generally, Stéphane Beaulac, "Interlégalité et réception du droit international en droit interne canadien et québécois", in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds., *JurisClasseur Québec – Droit constitutionnel*, looseleaf updated 2015 (Montreal: LexisNexis Canada, 2011), fasc. 23.

[60] [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.).

of the Quebec Premier, during a period known as the *grande noirceur*. It was a landmark decision in Canada's public law, no doubt, but it was handed down in the 1950s. Did it pave the way, legally speaking, for what followed in the 1960s, with Premier Lesage's new type of governance, much more democratic and in line with rule of law values? Perhaps, but it is surely not tantamount to setting up the stage for a (quiet) revolution.

Another example is the legislative reform to truly take into account and respect Quebec's distinctive legal tradition — the French-based *droit civil*, in private law — with the creation of the Civil Law Section at the Department of Justice Canada, in the late 1990s, and the enactment of the first *Federal Law-Civil Law Harmonization Act*,[61] at the turn of the millennium. Although it is generally not on the radar, let me suggest that this major change was no less than paradigmatic for Quebec's legal and constitutional existence, much more than anything that occurred in the 1960s. Politically, it took two dramatic referenda on Quebec independence,[62] as well as the painful failures of both the Meech Lake and Charlottetown accords, for the federal government to finally take Quebec's distinctive legal identity seriously. Is there a link between this legislative reform and the province's deep changes in society and governance in the 1960s? Maybe, in sociological terms, but for a constitutional scholar like me, the constitutional/legislative revolution, some of it "quiet", took place more in the 1980s and 1990s.

Going back to interlegality and the *Labour Conventions case*, in recent decades, it is the very *ratio decidendi* of the 1937 decision, requiring strict treaty implementation, which has been successfully challenged. Indeed, a material change took place concerning the national use of international law, following the 1999 *Baker case*,[63] where the dualist logic was relaxed to allow the use of unimplemented treaties as aids when interpreting domestic law. Unlike the Gérin-Lajoie statement's challenge to the federal plenary treaty-making power — which amounts

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[61] *Federal Law-Civil Law Harmonization Act, No. 1*, S.C. 2001, c. 4. Other pieces of legislation have been enacted since: *Federal Law-Civil Law Harmonization Act, No. 2*, S.C. 2004, c. 25; *Federal Law-Civil Law Harmonization Act, No. 3*, S.C. 2011, c. 21. Note that *Federal Law-Civil Law Harmonization Act, No. 4*, is now before Parliament and should be adopted shortly.

[62] See, generally, Frédéric Bérard & Stéphane Beaulac, *The Law of Independence – Quebec, Montenegro, Kosovo, Scotland, Catalonia* (Toronto: LexisNexis Canada, 2017).

[63] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.).

to "alternative facts" (*dixit* President Trump) — opening the door more widely to international law has had a major positive impact on the law in this country. One could suggest that the scheme set out in the *Labour Conventions case*, as good as it was in finding a proper equilibrium for the different principles at play, was perfected with *Baker*, at the turn of the new millennium.[64] It gave Canadian courts more leeway to resort to interlegality, and to be part of the globalized legal dialogue.[65]

[64] See Stéphane Beaulac, "Canada — Thinking Outside the Westphalian Box? Surely Not Yet!", in Fulvio M. Palombino, ed., *Supremacy of International Law vs. National Fundamental Principles – A Comparative Law Perspective* (Cheltenham, U.K.: Edward Elgar Publishing, 2017) [forthcoming].

[65] On this topic, see Anne-Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 U. Richmond L. Rev. 99; and, generally, Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).